

**BEFORE THE
MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY
MUMBAI.**

COMPLAINT NO: CC006000000000844

Allauddin Juned Shaikh ... Complainant.

Versus

Skyline Construction Co. ... Respondents.
(RNA Exotice)

MahaRERA Regn: -P51800007873

Coram: Shri B.D. Kapadnis,
Hon'ble Member & Adjudicating Officer.

Appearance:

Complainant: In person.

Respondents: Adv. Subit Chakrabarti.

Final Order.

16th April 2018

The Complainant has been seeking refund of his amount with interest under Section 18 of the Real Estate (Regulation and Development) Act, 2016(RERA) because the respondents failed to hand over the possession of flat no. C-3901, of their registered project RNA Exotica situated at Goregaon, as per the terms of the agreement as respondents do not have approval for constructing 39th floor where the booked flat is proposed to be constructed.

2. The respondents have pleaded not guilty and filed their reply to contend that the complaint is not in Form-B as laid down by Rule 7 of Maharashtra Real Estate (Regulation and Development) (Recovery of Interest, Penalty, Compensation, Fine payable, Form of Complaint and Appeal) Rule 2017. According to them, they could not complete the project because it is under rehabilitation scheme and they have to face many



hurdles in evacuating the encroachers, face the litigations and problems in obtaining the various sanctions and permissions mentioned in their reply. On 24.11.2010 they applied for Environmental Clearance and got it on 28th November 2012. They applied to the Airport Authority of India for height clearance on 04.11.2011. The said Authority gave its height clearance to the extent of 119.96 mtrs. above mean sea level and therefore, they had to file the Appeal on 12.02.2014 before the Appellate Committee of Ministry of Civil Aviation. On 27.08.2015 the said Authority revised the height and granted NOC. Therefore, they had reduced the height of the building by 5 residential floors and had to seek the amended approval from MMRDA. They have also referred to some issues regarding occupants who encroached in the building no R-210 during the period from 2015 to 2017. They got approval from MMRDA on August 2017 for amended building in which five upper floors have been reduced. Therefore, they submit that the reasons for delay are beyond their control. Hence, they request to reject the complaint.

3. Following points arise for determination. I record my findings thereon as under:

Points.	Findings.
1. Whether the respondents have failed to : complete the flat as per the terms of agreement for sale?	Affirmative.
2. Whether the complainant is entitled to : get refund of his amount with interest & compensation?	Affirmative.

REASONS.

Relevant provision:

4. The Section 18 of RERA provides that allottee can claim refund of his amount with interest and/or compensation if the promoter fails to

complete the apartment as per the terms of the agreement for sale. It gives the option to allottee to withdraw from the project. In view of this provision, the Complainant have exercised their right to withdraw from the project and they claim refund of their amount with interest.

5. Section 18 of RERA allows the allottee to collect his amount with simple interest at prescribed rate which is 2% above the MCLR of SBI. The current rate of MCLR of SBI is 8.05%.

Maintainability of complaint:

6. The respondents have taken a very technical stand that the complaint is not in B-form as laid down by rule 7. It is necessary to note that the complaints are to be filed online and the software developed by MahaRERA provides only one form to file the complaint either before the Authority or before the Adjudicating Officer. Therefore, I do not give any weightage to the technical objection taken by the respondents.

Respondents' inability to complete the flat as per the terms of the agreement for sale.

7. Respondents themselves have contended that they applied to the Airport Authority of India for height clearance on 04.11.2011. The said Authority gave its height clearance to the extent of 119.96 mtrs. above mean sea level and therefore, they had to file the Appeal on 12.02.2014 before the Appellate Committee of Ministry of Civil Aviation. On 27.08.2015 the said Authority revised the height and granted NOC. Therefore, they had reduced the height of the building by 5 residential floors and seek the amended approval from MMRDA. They got approval from MMRDA on August 2017 for amended building in which five upper floors have been reduced. This clearly makes it clear that the respondents are not going to construct 39th floor where the proposed flat of the Complainant is situated. This fact is established.



Entitlement of Complainant -Refund, interest, compensation & cost.

8. Though the respondents did not have the approval for constructing 39th floor, they collected money from the Complainant from 29th January 2013 onwards as shown in the statement of payments marked Exh. 'A'. The respondents did not have any authority to sell the flat and collect money from the Complainant especially when they did not have approval for constructing the same. The learned Advocate of the respondents argues that though the respondents applied for height clearance on 04.11.2011, the said Authority gave its height clearance to the extent of 119.96 mtrs. above mean sea level and therefore, they had to file the Appeal on 12.02.2014 before the Appellate Committee of Ministry of Civil Aviation. On 27.08.2015 the said Authority revised the height and granted NOC. Therefore, the ground for non-construction of 39th floor is beyond the control of the respondents. It is pertinent to note that though the things were clear on 27.08.2015 itself that 39th floor would not be constructed, the respondents have not refunded the amount of Complainant. They do not have any authority to retain the Complainant's amount. Even after this unfair and unethical practice is practised by the respondents, their learned advocate dares to submit that the Complainant are not entitled to get any compensation/interest or any relief. In this context, it is necessary to refer to Para 259 of the judgement passed by the Bombay High Court in Neelkamal Realtors Suburban Pvt. Ltd.-v/s-Union of India(Writ Petition No. 2737 of 2013,Original Side) holding that

" A perusal of Section 18 indicates that payment of interest including compensation or interest, as the case may be, is payable on account of default committed by the promoter. Although this Section does not consider a situation where the promoter is unable to complete or hand over possession for no fault of his own, it would be open to him to claim frustration in such a case and return the money to the allottee with interest thereby stopping the interest that

is to be paid till handing over possession. The provisions of RERA ensures that the allottees' money is not misused or unreasonably retained by the promoter. "

Thus, even in the case of frustration the promoter is bound to return the amount of allottee with interest. The learned advocate of the respondents refers to Para-127 of the said judgement to submit that the interest is to be paid prospectively. Relevant portion thereof reads as under-

" The requirement to pay interest under Section 18 is not penal since payment of interest is compensatory in nature due to delay suffered by the flat purchasers (Alok Shanker Pandey-v/s-Union of India (Supra)) Even assuming that the interest is penal in nature, levy of interest is not retrospective but is only based on antecedent facts; it operates prospectively".

I find that Section 72 also refers to the fact that the amount of disproportionate gain wherever quantifiable, made as a result of default can also be taken into consideration along with such other factors which are necessary to be considered in furtherance of justice while adjudging compensation. Considering these provisions and observations of the Hon'ble High Court I find that the safest course is to strike the balance by allowing the interest with effect from 01.05.2017 when RERA came into force. So far as the monetary loss of pre-RERA period is concerned, the Complainant can be compensated by allowing the compensation at the same rate.

9. The Complainant has produced the statement of payment marked Exh.'A 'showing the amount paid by him. I find that the respondents have defaulted in completing the construction of a flat even after collecting the money in the year 2013-14 from the Complainant. Therefore, Complainant is entitled to get its refund on respondents' failure to construct the flat in

terms of agreement for sale. Respondents are liable to refund all the amount of consideration and reimburse all the other ancillary expenses appearing in the statement. Respondents are liable to pay compensation and interest on amount of consideration as discussed above. The prescribed rate of interest and compensation is now 10.05 %.

10. The Complainant has been kept on hope by the respondents that they shall deliver the possession of the booked flat. However, now they have shown their inability to provide the flat. In view of mental stress, experienced by the Complainant on account of uncertainty in getting the flat or the refund of their amount and loss of opportunity, I find that the Complainant is entitled to get Rs. 1,00,000/- towards compensation in addition to the aforesaid compensation awarded due to monetary loss. The respondents are liable to pay Rs. 25,000/- towards the cost of the complaint. Hence, the following order.

ORDER.

1. Respondents shall refund the Complainant the amount mentioned in Exh.'A'.
2. The Exh. 'A' shall form the part of this order.
3. The respondents shall pay the amount shown in the Exh.'A' with compensation at the rate of 10.05% per annum from the date of receipt till 30.04.2017 and interest at the same rate from 01.05.2017 till all the amount are repaid.
4. The respondents shall pay the Complainant Rs. 1,00,000/- towards the compensation.
5. The respondents shall pay the Complainant Rs. 25,000/- towards the cost of complaint.
6. The charge of the aforesaid amount shall be on the respondents' CTS Nos. 98/10, 101 to 110, 111(Pt) and 149 (Pt) of village



Goegaon under Oshiwara District Centre, Goregaon (W),
Mumbai till satisfaction of Complainant's claim.


(B.D. KAPADNIS)

Mumbai
Date: 16.04.2018

Member & Adjudicating Officer,
MahaRERA, Mumbai.



STATEMENT OF PAYMENTS MADE TO M/S SKYLINE CONSTRUCTIONS CO.

No.	Cheque No.	Date	Bank Name	Amount	Purpose
1	267877	29-Jan-13	HDFC Bank	10,00,000	Part payment towards flat No. 3901/C
2	857520	28-Mar-13	HDFC Bank	60,43,202	Part payment towards flat no. 3901/C
3	267909	29-Nov-13	HDFC Bank	5,46,566	Part payment towards Flat No.3901/C
4	267910	29-Nov-13	HDFC Bank	20,267	Part payment towards Flat No.3901/C
5	100007	26-Feb-14	Bharat Bank	5,55,497	Part payment towards Flat No.3901/C
6	832241	15-Sep-14	SBI	5,41,100	Part payment towards Flat No.3901/C
TOTAL PAYMENT TO ITMC				₹ 8,708,632	

CASH PAYMENT

1. 12,00,000 -Car parking. 27-2-13
2. 15,00,000 -Part payment towards Flat No.3901/C 27-2-13

TOTAL PAYMENT TO M/s.Skyline Construction Co.

Stamp Duty

Registration

VAT

Total Payment advanced by the Complainant

1,14,08,632 (Cheques + Cash)

6,84,000

30,000

1,36,642

1,22,59,274

1,22,59,274

Exhibit - A'

Master II

(2)